Strukturmas (Selangor) Sdn Bhd v Majlis Perbandaran Petaling Jaya

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2(S1)–22–488 OF 1991

KAMALANATHAN RATNAM J

20 APRIL 2001

Civil Procedure *— Costs — Security for costs — Dormant plaintiff company — Delay in filing application for security — Tardiness of defendant's previous solicitors — Whether security for costs against plaintiff should be allowed*

The suit was filed by the plaintiff almost ten years ago. The defendant's solicitor made a search at the registry of companies eight years after the suit was filed and discovered that the plaintiff's current liabilities far exceeded its current assets. The most significant revelation was that since 1992, the plaintiff had yet to file its annual audited accounts for the subsequent years. The defendant then applied for certain orders pertaining to security for costs against the plaintiff. The defendant's application was heard by the senior assistant registrar and was dismissed with costs. The defendant appealed.

Held, allowing the appeal with costs:

(1) Since 1992 and for the subsequent eight years the plaintiff had not filed the returns and this fact had not been denied by the plaintiff in its affidavit. Surely if there was any trading there must be returns. It called for a presumption that the plaintiff was a dormant company waiting to inject itself with funds from this case. It was also of significance to note that the company did not possess any landed property or other tangible assets. The plaintiff had also failed to state in its affidavit in reply what its present activities were, that it had properties, or that it was able to pay the defendant the costs in the event the plaintiff did not succeed in its action (see pp 347H–348A).

(2) The plaintiff blamed the defendant for putting it in such a predicament. It was not proper for the plaintiff to contend that its losses were occasioned as a result of the defendant's action and that this application was an attempt to stifle prosecution (see p 348E).

(3) Whilst the court agreed that there was this great delay, the defendant has explained the delay. It was only when the defendant changed solicitors on 15 June 1999 that the present solicitors made the search at the Registry of Companies and discovered the plaintiff's financial position. Surely the tardiness of the defendant's previous solicitors could not be a reason to refuse this application (see p 349B).

[Bahasa Malaysia summary

Tindakan tersebut difailkan oleh plaintif hampir sepuluh tahun yang lalu. Peguam defendan telah membuat carian di pendaftar syarikat lapan tahun selepas tindakan difailkan dan mendapati bahawa liabiliti semasa plaintif adalah jauh melampaui aset semasanya. Penemuan yang paling menonjol adalah bahawa sejak 1992, plaintif belum lagi memfailkan akaun audit tahunannya untuk tahun-tahun yang terkemudian. Defendan kemudiannya memohon untuk suatu perintah tertentu berkenaan dengan jaminan kos terhadap plaintif. Permohonan defendan didengar oleh penolong kanan pendaftar dan telah ditolak dengan kos. Defendan merayu.

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) Sejak 1992 dan lapan tahun yang kemudiannya plaintif tidak memfailkan pulangannya dan fakta ini tidak dinafikan oleh plaintif di dalam afidavitnya. Sudah tentu jika terdapat dagangan mestilah terdapat pulangan. Keadaan ini menwajarkan suatu anggapan bahawa plaintif adalah syarikat pendam yang menunggu untuk mendapatkan dana untuk perniagaannya dari kes ini. Adalah juga penting untuk mengetahui bahawa syarikat tersebut tidak memiliki sebarang hartanah atau aset nyata. Plaintif juga gagal menyatakan di dalam afidavit jawapannya apakah aktiviti terkininya, bahawa ia mempunyai hartanah, atau ia mampu untuk membayar defendan kos sekiranya plaintif tidak berjaya dalam tindakannya (lihat ms 347H–348A).

(2) Plaintif telah menyalahkan defendan di dalam meletakkannya di dalam kesusahan yang sedemikian. Adalah tidak wajar bagi plaintif untuk menegaskan bahawa kerugiannya berlaku atas akibat tindakan defendan dan bahawa permohonan ini adalah suatu cubaan untuk menyekat pendakwaan (lihat ms 348E).

(3) Sementara mahkamah bersetuju ini adalah kelewatan yang besar, defendan telah menerangkan kelewatan tersebut. Hanya apabila defendan mengubah peguamnya pada 15 Jun 1999 bahawa peguam yang terkini telah membuat carian di Pendaftar Syarikat dan mendapat tahu kedudukan kewangan plaintif. Sudah tentu kelewatan peguam defendan yang terdahulu bukanlah suatu alasan untuk menafikan permohonan ini (lihat ms 349B).]

Notes

For cases on security for costs, see 2(1) and 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1338–1969 and 4061–4068.

Cases referred to

Skrine & Co v MBf Capital Bhd & Anor [1998] 3 MLJ 649

Legislation referred to

Companies Act 1965 s 351
Local Government Act 1976
Rules of the High Court 1980 O 46 r 2(1)(a)

PG Jayendran (*KV Kanahaletchumi* with him) (*V Siva & Partners*) for the appellant/defendant.

Chan Chow Wang (*Philip Choong & Co*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

Facts

The plaintiff sued the defendant for breach of contract, or alternatively for specific performance, and sought damages and costs. For the purposes of the present appeal, there is no need for me to go into the details. The plaintiff filed this suit in 1991 and the matter has dragged on for almost ten years. After the defendant had changed solicitors on 15 June 1999, the latter made a search at the registry of companies ('the ROC') and discovered the financial position of the plaintiff. The search made at the ROC has been exhibited. It discloses revealing facts. As at 30 April 1992, the plaintiff's paid-up capital was only RM120,000. As at 30 April 1992, it had incurred a loss of RM507,368. The losses before taxation amounted to RM56,985. The plaintiff's current liabilities of RM575,142 far exceed the current assets amounting to RM121,874. The fixed assets of the plaintiff is only RM65,900. The most significant revelation is that since 30 April 1992, the plaintiff has yet to file its annual audited accounts for the subsequent years.

The application

Based on these unrebutted facts the defendant applied for the following orders:

(a) that the plaintiff do within fourteen (14) days from date of this order give security for a sum of RM166,126.40 and/or such sum as security for costs made pursuant to s 351 of the Companies Act 1965 (Act 125) and/or under the inherent jurisdiction of this court;

(b) that unless and until the plaintiff gives security for the sum of RM166,126.40 and/or such sum within the stipulated time frame the plaintiff's action against the defendant and/or all further proceedings be stayed;

(c) that unless and until the plaintiff gives security for the sum of RM166,126.40 and/or such sum within the stipulated time frame the plaintiff's action against the defendant be dismissed with costs and/or to be taxed; and

(d) that such further and/or other reliefs as this court deems fit, proper and just to grant.

On 22 August 2000, the learned senior assistant registrar ('the SAR') heard the defendant's application (encl 82) and dismissed the same on 13 October 2000 with costs. This is the defendant's appeal against that decision.

Findings of the court

It is the defendant's case that there is reason to believe that the plaintiff will be unable to pay the costs of this suit if the defendant is successful in dismissing it. I must also bear in mind that the defendant is a local government and is governed by the Local Government Act 1976. The defendant has also counterclaimed. From the affidavit of Yong Yoon Chow, the manager of the plaintiff, I gather that the defence was filed on 16 May 1992 and the amended defence filed on 1 April 1994. However, the reamended defence with counterclaim was filed on 23 December 1997. The plaintiff has given no explanation why it did not set the case down for trial any earlier. It is the duty of the plaintiff in any action, to oil the wheels of the court machinery by initiating various proceedings open to it, so that the plaintiff's case can move with regularity. Of course this will no longer be a problem with the advent of case management into our system. But that does not exculpate the tardiness of a plaintiff who had failed to act to enter its case for trail, prior to the advent of case management into our civil procedure.

The defendant's application for security for costs is under s 351 of the Companies Act 1965 ('the Act') which reads as follows:

> Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

The costs of any proceeding before a court under the Act shall be borne by such party to the proceeding as the court may, in its discretion, direct.

It would seem that the key words in s 351 of the Act are 'credible testimony'.

Credible testimony

I have no hesitation in accepting the report from the ROC pursuant to the search made, disclosing the plaintiff's impecuniosity. Whilst it is possible for a company not to boast of a large paid-up capital in order to be able to carry on business but where the company is also unable to show any reasonable sum in respect of fixed assets, then the financial position of the company becomes an issue when the opposing party raises the issue of costs. In this case, whilst the plaintiff's claim is for unspecified general damages for breach of contract, its fixed assets only amounts to RM65,900. There is a further compounding effect. Since 1992 and for the subsequent eight years the plaintiff has not filed the returns and this fact has not been denied by the plaintiff in its affidavit. Surely if there is any trading there must be returns. It calls for a presumption that the plaintiff is a dormant company waiting to inject itself with funds from this case. It is also of significance to note that the company does not possess any landed property or other tangible assets. The plaintiff has also failed to state in its affidavit in reply what its present activities are, that it has properties, or that it is able to pay the defendant the

costs in the event the plaintiff does not succeed in its action. It is important that when an application is made by a party for security for costs against another, the opposing party must state affirmatively that it would be in a position to pay the taxed costs preferably with supporting documents showing its ability to pay the costs. In this case, the plaintiff has maintained a discreet silence. The only inference the court can draw is that the plaintiff was unwilling to put in print its admission of its inability to pay the taxed costs. In *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649, the Court of Appeal held that s 351(1) of the Act provides for a two-stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company; that is, the court has to determine: (i) whether there is credible evidence; and (ii) whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant. Applying this test, I find that the plaintiff will be unable to pay the costs if the defendant succeeds in the appeal and in the exercise of my discretion after evaluating the available credible evidence, I was of the view that security for costs ought to be given in this case. Since in this case both parties have had the opportunity of showing the court all relevant facts pertinent to the issue before the court, in order to do justice, the court must make its decision only upon the assessment of those facts before the court.

The plaintiff blames the defendant for putting it in such a predicament. To my mind, it is not proper for the plaintiff to contend that its losses were occasioned as a result of the defendant's action and that this application is an attempt to stifle prosecution. Whilst this action was commenced in 1991, the plaintiff only delivered vacant possession of both the swimming pool and the sports complexes to the defendant in September 1995. The plaintiff pointed out that the defendant had taken out a distress suit, Originating Summons No 35–7–92 at the Shah Alam High Court on 18 January 1993 against the plaintiff, which was dismissed with costs and for damages to be assessed. The plaintiff now says that the costs and damages that the plaintiff could get against the defendant in that case would be sufficient to set off any costs that would be awarded in this case against the plaintiff if it lost this suit. The defendant annexed as an exhibit to an affidavit in reply, the draft order of the Shah Alam suit awarding costs. Mr Chan for the plaintiff was unable to explain why to date he has not proceeded even to obtain a fair order to enable him to execute on the judgment. In any case, more than six years have gone by since the order had been made on 18 January 1993. Pursuant to O 46 r 2(1)(a) of the Rules of the High Court 1980, the plaintiff will now have to get the leave of court before he could even execute on the judgment since six years and more have lapsed since the date of the judgment. There is no guarantee that he would get the leave.

The defendant, on the other hand, pointed out that in respect of this same case before me the plaintiff had obtained on 31 October 1991 an order from the High Court injuncting the defendant from taking possession of the sports complexes. The Court of Appeal had however allowed the appeal by the defendant and ordered the plaintiff herein to deposit into court within

14 days from the date of the order RM1,000,000 failing which the order granting the injunction made by the High Court would automatically stand dissolved. The Court of Appeal further ordered costs of both proceedings to be paid to the defendant by the plaintiff. The plaintiff did not make the deposit and the injunction stood dissolved. The main thrust of the plaintiff's argument in opposing this application was the inordinate delay in filing it. Whilst I agree that there is this great delay, the defendant has explained the delay. It is only when the defendant changed solicitors on 15 June 1999 that the present solicitors made the search at the ROC and discovered the plaintiff's financial position. Surely the tardiness of the defendant's previous solicitors cannot be a reason to refuse this application. At least, the defendant has made the move even at this stage. As for the delay, s 351 of the Act does not state when the security for costs ought to be applied. As to whether an order for security for costs at this stage would be tantamount to stifling a valid claim, I must reject this argument. The defendant did not make this application immediately upon the suit being filed. So the issue of stifling a valid claim does not arise. If the application for security for costs is to be treated as stifling a valid claim then such an argument would be most effective if an application for security for costs is made as soon as the suit is filed and served. But here, this application is made only after the defendant's new solicitors who came into the picture in 1999 made a search in the ROC and discovered the plaintiff's financial standing.

Having considered all issues, I allowed the defendant's appeal with costs by setting aside the order of the learned SAR made on 22 August 2000. I ordered the sum of RM75,000 as security for costs to be given by the plaintiff either by way of a banker's guarantee or by depositing the same into court or into a joint account of both solicitors, within three weeks from the date of my order.

Appeal allowed with costs.

Reported by Wong Ee Lynn